United States Court of Appeals

for the Second Circuit

APPENDIX

75-2125

VOLUME I

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, ex rel THOMAS F. BYRNES :

Petitioner-Appellant :

-against- :

HAROLD J. SMITH, Superintendent Attica Correctional Facility :

Respondent-Appellee :

- -x

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P/S

DOCKET NO. T-4950

On Appeal from the United States District Court for the Eastern District of New York

APPENDIX FOR PETITIONER-APPELLANT

JAMES J. McDONOUGH
Attorney for Petitioner-Appellant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

3

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TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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THOMAS F. BYRNES,

Petitioner,

-against-

HAROLD J. SMITH, Superintendent
Utica Correctional Facility,

Respondent.

----------X

MEMORANDUM AND ORDER

75-C-721

A P P E A R A N C E S:

James J. McDonough, Esq.
Legal Aid Society of Nassau County
400 County Seat Drive
Mineola, New York 11501
Matthew Muraskin, Esq.
Norman S. Hatt, Esq.
Of Counsel
Attorney for Petitioner

Honorable Louis J. Lefkowitz
Attorney General of the State of New York
2 World Trade Center
New York, New York 10047
Stanley L. Kantor, Esq.
Assistant Attorney General
Of Counsel
Attorney for Respondent

WEINSTEIN, D.J.

(6)

Petitioner complains that his conviction in state courts for the crimes of rape, sodomy and incest was improper because he was denied his constitutional right to be present when a major witness, namely his daughter, testified against him. The court has examined the extensive papers submitted by the petitioner. It has also studied the extensive affidavit of an Assistant Attorney General in opposition. To assure itself of the validity of the contentions of the parties it requested submission by the Assistant Attorney General of the transcripts of the trial. These have now also been examined..

It is apparent that the petitioner created constant disturbances in the courtroom and that after repeated warnings the trial judge was fully justified in excluding him from the courtroom. The petitioner's claims were fully considered by the state courts and properly rejected. The record indicates that the County Court judge trying the case was quite protective of the petitioner. His rulings on evidence were very conservative and tended to give the petitioner more protection that he was entitled to in a constitutional sense. The petition is dismissed.

The Clerk of the Court shall send a copy of this Memorandum and Order to counsel and to the petitioner.

The Clerk of the Court shall arrange with the Assistant Attorney General in charge of the case for the return of the transcripts.

So ordered.

Dated: Brooklyn, New York
June 26, 1975

U.S.D.J.

TO BE ARGUED BY:
MATTHEW MURASKIN
25 Minutes

COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK :

Respondent :

-against- :

THOMAS FRANCIS BYRNES, :

Defendant-Appellant :

----------x

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT

JAMES J. McDONOUGH
Attorney for Defendant-Appellant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
County Court House
Mineola, New York

OF COUNSEL:

MATTHEW MURASKIN

TABLE OF CONTENTS

POINT TWO

APPELLANT WAS DEPRIVED OF HIS RIGHT OF CONFRONTATION BY HIS EXCLUSION FROM THE COURTROOM

The confrontation clause of the Sixth Amendment which is obligatory upon the States (Pointer v. Texas 380 U.S. 400) provides that an accused has the right to be present in the courtroom at every stage of his trial. Lewis v. United States 146 U.S. 370. While a defendant may lose this right by disruptive conduct, (Illinois v. Allen 397 U.S. 337) we urge, that in this case, it was error to banish the defendant from the courtroom during the testimony of the complaining witness.

Prior to the incident which purports to be the reason for defendant's exclusion he had; shouted out at various times that he was taking drugs (377); insulted the court (415-418) and cursed (390-391). While the defendant was physically subdued on one of these occasions (415-418) he was not excluded nor was he excluded for his conduct subsequent to his being removed from the court.

At p.420 the record indicates that when defendant's daughter entered the courtroom something took place which required the defendant to be restrained. Judge Altimari remarked that what took place was an assaultive burst towards the witness designed to intimidate her (421;423). The Court then recessed for the day with the thought that defendant would not be in the courtroom when the witness testifies (424).

Counsel then made a motion for a mistrial on grounds that when the complaining witness entered the courtroom she was ac-

another chance and promised to behave (443). The Court responded that counsel's position was inconsistent with defendant's prior concern about traumatizing the witness (449). The Court then went into chambers where it asked Tamara what she wanted him to do and she replied if her father was in the courtroom she was not going in (445).

Back in Court counsel reiterated his client claimed he was under the influence of drugs on the day of the big outburst (446) and assured the Court that defendant was now lucid and that there would be no further outbursts (447-448) and if necessary his client should be bound and gagged but left in the courtroom (448).

The Court excluded defendant, in an opinion read from a prepared text (448).

We say error was committed, because when all is said and done it appears that defendant was banished from the courtroom as an accommodation to the complaining witness and as a punishment for his prior behavior.

In Allen, supra:

> "The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his

lawyer. He terminated his remarks by saying, 'When I go out for lunch-time, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

"After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case'. The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witness from the courtroom. The [petitioner] protested this effort on the part of his attorney saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." 413 F2d. at 233-234. After this second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel.

The difference here is critical. In the judge's order (A36) he directed that the defendant be removed from the Courtroom during Tamara's testimony. And while defendant could retain his right to be present on a promise of good conduct it is clear he could not do so until after the witness finished her testimony. This smacks of impermissible punishment for Allen at 343 held

> [T]he right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (Emphasis added)

Unlike Allen where the defendant was excluded immediately after the disruptive incident the court in the present case recessed for the day and banished defendant on the following day even though defendant at this time was calm and his counsel offered assurance that his client would now behave properly. We believe that defendant's demeanor and counsel's assurances on the day after the incident reclaimed whatever right defendant might have lost. Indeed, under the circumstances here, counsel's additional offer to have his client bound and gagged* should have satisfied the court that there would be no further disruption.

As an alternative we urge that since binding and gagging is a permissible alternative to exclusion a request by counsel for the alternative which would have the same effect as exclusion should be honored. In Allen the court had some reservations about shackles but this should be set aside where defense counsel makes an affirmative request for this alternative.

*[illegible] his right hand free to make notes

In making the argument we are aware that (PL §340.50 (3)) which provides for exclusion of disruptive defendants makes no reference to their return. We submit that due process and the [illegible] decision itself which states that the right can be re-claimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings must be read into the statute to make it constitutionally permissible. cf. People v. [illegible], 21 N.Y.2d 588. To the extent that the Court followed the statute and made no provision for defendant's return until after the witness testified, he was denied his right to due process of law and the right of confrontation and the judgment must be reversed.

We are also aware (22 NYCCRR §702.2) that the rules of the Appellate Division provided for the removal of disruptive defendants but subdivision (c) also sets forth

> The defendant shall be returned to the courtroom immediately upon a determination by the court that the defendant is not likely to engage in further disruptive conduct.

In his order of exclusion the court did provide that defendant could re-claim the right but he also made clear that defendant could not re-claim it until after Tamara testified (454). Here he also found that defendant had intimidated the witness this cannot serve as the basis for his exclusion for this would be punishment.

It is also clear that the court in issuing its order, read from a prepared text which did not and could not consider defendant's assertion that defendant would not behave. Under the

circumstance we say the court banished defendant a day after the incident without considering his claim that he regained the right to be present in an order which precluded him from regaining that right during his daughter's testimony.

We also urge that the court unduly accommodated the complaining witness at the expense of defendant's constitutional rights.

In chambers, just before excluding the defendant the court asked Tamara "What is your pleasure? What do you want me to do?" with regard to the presence of her father (445). Tamara said if her father was in the room she would not go in (444).

The court was concerned about "heaping more trauma" upon Tamara (444) but since he had already ruled that she could testify despite the objection of future trauma to Tammy it is difficult to see how she could be further harmed by testifying in her father's presence. Whatever had been done to Tamara was over and her father's continued presence in the courtroom (properly behaving) could not effect the situation.

In any event none of this is really relevent. If Tamara would testify at all then she was required to testify as any other witness. If defendant needed to be punished for his prior outburst contempt would have been a proper response Mayberry v. Pennsylvania, 400 U.S. 455; see Johnson v. Mississippi 403 U.S. 212, 214, not the loss of his constitutional rights.

We would also urge that the Court committed error in refusing out of hand defendant's assertion and counsel's claim that defendant's outbursts were the results of drugs taken at

the jail. Regardless of the Court's apparent feeling towards the defendant's conduct, the claim was not patently incredible. An examination at the time as requested by counsel would not have caused any delay in the trial and would have ended any doubts as to defendant's motivations. It follows, of course, that if defendant was under the influence of drugs, not only was the exclusion improper but so was the continuation of the trial. In any event the claim advanced was not an incredible one so that error was committed in rejecting it out of hand without ordering an additional medical examination.

STATE OF NEW YORK

COUNTY COURT : NASSAU COUNTY

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent :

-against- :

THOMAS FRANCIS BYRNES :

Defendant-Petitioner :

NOTICE OF MOTION TO VACATE JUDGMENT

INDEX NO. 31912

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit of MATTHEW MURASKIN, ESQ., duly sworn to on September [illegible], 1974 (and documents attached thereto) and upon the accusatory instrument and all the proceedings heretofore had herein; a motion will be made in the County Court of Nassau County, Special Term, Part II thereof, at the Courthouse located at Supreme Court Drive, Mineola, New York on October 15, 1974 at 9:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order vacating the judgment heretofore entered against the above named defendant on January 4, 1972 pursuant to §440.10 of the Criminal Procedure Law on the ground that judgment was obtained in violation of a right guaranteed to the defendant by the constitution of the United States; and for such other and further relief as to the court may seem just and proper.

Yours, etc.,

DATED: Mineola, New York

JAMES J. McDONOUGH
Attorney for Defendant
Attorney in Charge
Legal Aid Society of Nassau County
Criminal Division
400 County Seat Drive
Mineola, New York

TO: HON. WILLIAM CAHN
District Attorney
Nassau County

STATE OF NEW YORK

COUNTY COURT : NASSAU COUNTY

- -x

THE PEOPLE OF THE STATE OF NEW YORK :

Respondent :

-against- : INDEX NO. 31912

THOMAS FRANCIS BYRNES :

Defendant-Petitioner :

- -x

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

MATTHEW MURASKIN, being duly sworn, deposes and says:

I am an attorney for the above named defendant and make this affidavit in support of a motion to vacate judgment of conviction upon the ground that it was obtained in violation of a right guaranteed to the defendant under the Constitution of the United States, as provided for by Section 440.10 subdivision 1 (h) of the Criminal Procedure Law.

The defendant was indicted for the crime of sodomy in the first degree, rape in the first degree and incest on June 4, 1971. Trial was had in this Court before the Hon. Frank X. Altimari, Nassau County Court Judge, and a jury on November 22, 23, 29 and 30, 1971 and December 1, 2 and 3, 1971. The case was submitted to a jury and the jury rendered a verdict of guilty on all counts. Thereafter, on January 4, 1972, the defendant was sentenced to a term of 8 1/3 to 25 years imprisonment. On appeal, the Appellate Division, Second Department, affirmed the judgment of the trial court without opinion. 40 A.D.2d 951 (1972). Thereafter an appeal was taken to the Court of Appeals, which affirmed with a unanimous written

opinion. 33 N.Y.2d 343 (1974). Defendant sought a Writ of Habeas Corpus in the United States District Court for the Eastern District of New York, before the Hon. Jack B. Weinstein, District Judge (United States of America ex rel Thomas Byrnes v. Harold Smith, Superintendent of the Attica Correctional Facility, 74-C-683). The Court denied issuance of the Writ at an ex parte hearing. Thereafter defendant was denied a Certificate of Probable Cause by the United States Court of Appeals for the Second Circuit (74-8179, July 24, 1974).

Defendant moves to vacate the judgment of conviction under which he is presently incarcerated on the ground that he was excluded from his trial during that portion when testimony was given by his daughter Tamara Byrnes in order to accomodate the witness and to punish the defendant for his prior disorderly behavior in the courtroom. Exclusion for these purposes violated the defendant's right to confrontation guaranteed by the Sixth Amendment of the United States Constitution. The defendant raised the issue of the reason for his exclusion as one of the points in his appeal to the Appellate Division and the Court of Appeals (Point Two in Appellant's brief to the Court of Appeals). However, the appellate courts failed to deal with defendant's specific claim that he had been excluded from the courtroom as an accomodation to the witness, who had told the Court she would not testify if defendant was present, and punishment for the defendant. Defendant, therefore, brings this motion to vacate judgment in order to obtain review of the reason for his exclusion from his trial by Judge Altimari.

In the ex parte hearing in which the defendant sought issuance of a Writ of Habeas Corpus before Judge Weinstein, the Court found that the defendant would have "substantial ground" to obtain the Writ if defendant's allegations as to why he had been excluded were found to be true

(Transcript of hearing at page 14), but the Court denied the Writ for failure to exhaust state remedies (Id), having concluded that the "issue [had] not been decided by the New York Courts." (Id. at 13). The District Court then advised the defendant as follows:

> "You had better get [the matter of why the defendant was excluded from his trial] straightened out and have a writ of coram nobis in the State Court. I am going to hold that open to you by not dismissing on the ground that that is not a constitutional basis for the writ because I think that is a very serious issue. But I hold that on that issue you have not exhausted your state remedy." (Id. at 15).

Your deponent submits that the reason for which the defendant was excluded was in direct violation of his constitutional rights. The confrontation clause of the Sixth Amendment which is obligatory upon the States (Pointer v. Texas, 380 U.S. 400) provides that an accused has the right to be present in the courtroom at every stage of his trial. Lewis v. United States, 146 U.S. 370. While a defendant may lose this right by disruptive conduct (Illinois v. Allen, 397 U.S. 337), the defendant here had not engaged in conduct sufficient to cause forfeiture of his right. Hence it was error to banish the defendant from the courtroom during the testimony of the complaining witness.

Prior to the incident which purports to be the reason for defendant's exclusion he had shouted out at various times that he was taking drugs (trial transcript at 377); insulted the court (415-418) and cursed (390-391). While the defendant was physically subdued on one of these occasions (415-418), he was not

excluded as a result of any of those incidents, nor was he excluded for his conduct subsequent to his being removed from the court.

At p.420 the record indicates that when defendant's daughter entered the courtroom, something took place which required the defendant to be restrained. Judge Altimari remarked that what took place was an assaultive burst towards the witness designed to intimidate her (421; 423). The Court then recessed for the day with the thought that defendant would not be in the courtroom when the witness testified (424).

Counsel then made a motion for a mistrial on grounds that when the complaining witness entered the courtroom she was accompanied by a policewoman named Hahn which improperly conveyed to the jury that the witness needed protective custody (427). The Court denied the motion saying Hahn was there solely to put Tamara Byrnes at ease and that the day before the little girl sort of clung to Hahn (428).

At this point the defendant yelled out:

> Bullshit. She's the one that's trying to take the kids away from my wife too, she's the one that's got the charges in Queens, Hahn. She's trying to take the kids away from my wife (428).

While the outburst was not proper, defendant's statement was true. This Court can take judicial notice that Policewoman Hahn of the Juvenile Aid Bureau was the petitioner in a neglect proceeding in Queens Family Court filed against the defendant and his wife entitled in re Byrnes Children which

had as its purpose the removal of the Byrnes children from the custody of their parents.

Under the circumstances defendant's outburst at this point is quite understandable in view of the Court's statement and its apparent unawareness of Hahn's real status in the case.

The Court then recessed for the day and asked for authority to help it make a judgment whether to proceed the next day with the defendant shackled or with him absent (429). The Court concluded it was of the opinion that not only would defendant disrupt the trial but intimidate the witness (429).

The next day argument was heard on whether the defendant should be present when the witness testified (442). The Court believed defendant's outburst was a deliberate attempt to intimidate the witness (443). Counsel responded by stating his client wanted another chance and promised to behave (443). The Court responded that counsel's position was inconsistent with defendant's prior concern about traumatizing the witness (449). The Court then went into chambers where it asked Tamara what she wanted him to do and she replied if her father was in the courtroom she was not going in (445).

Back in Court counsel reiterated that his client claimed to be under the influence of drugs on the day of the big outburst (446) and assured the Court that defendant was now lucid and that there would be no further outbursts (447-448) and if necessary his client should be bound and gagged but left in the courtroom (448). Nevertheless, the court excluded defendant, in an opinion read from the prepared text (448).

Error of constitutional dimension was committed because, after defendant's promise to maintain courteous conduct, and his offer to submit to binding and gagging, his exclusion from the trial was neither necessary nor proper. It is clear that defendant's exclusion under the circumstances here did not comport with the guidelines for exclusion of unruly defendants sanctioned by the United States Supreme Court in Illinois v. Allen, supra.

In Allen:

> "The trial began on September 9, 1957. After the State's Attorney had accepted the first four jurors following their voir dire examination, the petitioner began examining the first juror and continued at great length. Finally, the trial judge interrupted the petitioner, requesting him to confine his questions solely to matters relating to the prospective juror's qualifications. At that point, the petitioner started to argue with the judge in a most abusive and disrespectful manner. At last, and seemingly in desperation, the judge asked appointed counsel to proceed with the examination of the jurors. The petitioner continued to talk, proclaiming that the appointed attorney was not going to act as his lawyer. He terminated his remarks by saying, 'When I go out for lunch-time, you're [the judge] going to be a corpse here.' At that point he tore the file which his attorney had and threw the papers on the floor. The trial judge thereupon stated to the petitioner, 'One more outbreak of that sort and I'll remove you from the courtroom.' This warning had no effect on the petitioner. He continued to talk back to the judge, saying, 'There's not going to be no trial, either. I'm going to sit here and you're going to talk and you can bring your shackles out and straight jacket and put them on me and tape my mouth, but it will do no good because there's not going to be no trial.' After more abusive remarks by the petitioner, the trial judge ordered the trial to proceed in the petitioner's absence. The petitioner was removed from the courtroom. The voir dire examination then continued and the jury was selected in the absence of the petitioner.

> "After a noon recess and before the jury was brought into the courtroom, the petitioner, appearing before the judge, complained about the fairness of the trial and his appointed attorney. He also said he wanted to be present in the court during his trial. In reply, the judge said that the petitioner would be permitted to remain in the courtroom if he 'behaved [himself] and [did] not interfere with the introduction of the case.' The jury was brought in and seated. Counsel for the petitioner then moved to exclude the witness from the courtroom. The [petitioner] protested this effort on the part of his attorney saying: 'There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me.' The trial judge thereupon ordered the petitioner removed from the courtroom." 413 F2d at 233-234. After this second removal, Allen remained out of the courtroom during the presentation of the State's case-in-chief, except that he was brought in on several occasions for purposes of identification. During one of these latter appearances, Allen responded to one of the judge's questions with vile and abusive language. After the prosecution's case had been presented, the trial judge reiterated his promise to Allen that he could return to the courtroom whenever he agreed to conduct himself properly. Allen gave some assurances of proper conduct and was permitted to be present through the remainder of the trial, principally his defense, which was conducted by his appointed counsel. (emphasis added).

The difference between the treatment of the defendant in Allen and the treatment of the defendant here is critical. In the judge's order (454) he directed that the defendant be removed from the courtroom solely during Tamara's testimony. And while defendant could reclaim his right to be present on a promise of good conduct, it is clear he could not do so until after the witness finished her testimony. This smacks of impermissible punishment, for Allen at 343 held

> [T]he right to be present can, of course, be reclaimed as soon as the defendant is

> willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings. (Emphasis added).

If defendant needed to be punished for his prior outburst, contempt would have been a proper response Mayberry v. Pennsylvania, 400 U.S. 455; see Johnson v. Mississippi, 403 U.S. 212, 214 - not the loss of his constitutional rights.

Unlike Allen where the defendant was excluded immediately after the disruptive incident, the court in the present case recessed for the day and banished defendant on the following day even though defendant by this time was calm and his counsel offered assurances that his client would now behave properly. Your deponent asserts that by defendant's demeanor and counsel's assurances on the day after the incident, defendant reclaimed whatever right he may have lost. Indeed, under the circumstances here, counsel's additional offer to have his client bound and gagged should have satisfied the court that there would be no further disruption.

It is clear, however, that the court in issuing its order did not consider counsel's assertion that defendant would behave, nor his offer to submit to binding and gagging, since Judge Altimari read from a text prepared before defendant returned to court with assurances of good conduct. The defendant was excluded a day after the incident without receiving any consideration of his claim that he had regained his right to be present.

As an alternative deponent urges that since binding and gagging is a permissible alternative to exclusion, a request by counsel

for the alternative which would have the same effect as exclusion should have been honored. In Allen the court had some reservations about shackles but this concern should be set aside where defense counsel makes an affirmative request for this alternative. Again, because the court failed to consider this alternative to exclusion requested by defendant, it is clear that the court had concluded in advance that the defendant could not regain his right to be present during the testimony of Tamara Byrnes. The court thus manifestly violated the mandate of Allen that a defendant be allowed to reclaim his right to be present immediately upon proper assurances that he would "conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." Allen, supra, at 343.

In making the argument your deponent is aware that Penal Law §340.50 (3) which provides for exclusion of disruptive defendants makes no reference to their return. We submit that due process and the Allen decision itself which states that the right can be reclaimed as soon as the defendant is willing to conduct himself with decorum and respect must be read into the statute to make it constitutionally permissible. Cf. People v. Bailey, 21 N.Y.2d 588. To the extent that the Court followed the statute and made no provision for defendant's return until after the witness testified, he was denied his right to due process of law and the right to confrontation.

Your deponent is also aware that the rules of the Appellate Division (22 NYCCRR Sec. 702.0) provide for the

removal of disruptive defendants but subdivision (c) also sets forth:

> The defendant shall be returned to the courtroom immediately upon a determination by the court that the defendant is not likely to engage in further disruptive conduct.

In his order of exclusion the court did provide that defendant could re-claim the right but he also made clear that defendant could not do so until after Tamara had testified (454). While he also found that defendant had intimidated the witness, this finding cannot serve as the basis for his exclusion, for this would be impermissible punishment.

From Judge Altimari's conduct and comments it is clear that, far from attempting to follow the guidelines established by Allen, his decision to exclude the defendant from his trial was intended as an accomodation to the complaining witness and as a punishment for defendant's prior conduct - reasons which render the defendant's exclusion unconstitutional. Such accomodation or punishment is not permissible at the expense of defendant's constitutional right to be present at his trial.

Judge Altimari's colloquy with Tamara Byrnes established his concern to accomodate the witness. In chambers, just before excluding the defendant, he asked her, "What is your pleasure? What do you want me to do?" with regard to the presence of her fatner (445). Tamara said if her father was in the room she would not go in (444).

The Court was concerned about "heaping more trauma" upon Tamara (444) but since he had already ruled that she could testify despite the objection of future trauma to Tammy, it is difficult to see how she could be further harmed by testifying in her father's presence. Whatever harm had been done to Tamara was over and her father's continued presence in the courtroom (properly behaving) could not effect the situation. In any event possible trauma to Tammy was not really relevant. If Tamara could testify at all, then she was required to testify as any other witness. A defendant's right to confront his accusers is absolute and is not be be balanced against possible discomforture of a witness who is required to confront the accused. It is a commonplace that if a witness cannot endure confronting the accused in court, the witness, not the accused, is the one that must suffer exclusion from the courtroom.

Your deponent also urges that the Court committed error in rejecting out of hand defendant's assertion and counsel's claim that defendant's outbursts were the results of drugs taken at the jail. Regardless of the Court's apparent feeling towards the defendant's conduct, the claim was not patently incredible. An examination at the time as requested by counsel would not have caused any delay in the trial and would have ended any doubts as to defendant's motivations. It follows, of course, that if defendant was under the influence of drugs, not only was the exclusion improper but so was the continuation of the trial. In any event the claim advanced was not an incredible one, so that error was committed in rejecting it out of hand without ordering an additional medical examination.

Your deponent submits that, in view of the ruling of the United States District Court holding that his claim herein had not received consideration in the courts of this state, he is entitled to a hearing on the instant petition pursuant to C.P.L. 440.30(5). Furthermore, to further comity between federal and state courts, this court should defer to the suggestion by the United States District Court that the defendant-petitioner be granted a hearing on his claim of unconstitutional exclusion.

Annexed hereto and made a part hereof as "Exhibit A" are extracts of the proceedings had in the County Court which show the court's reasons for excluding the defendant. A copy of the habeas corpus proceeding had before United States District Court Judge Weinstein is annexed as "Exhibit B". A copy of defendant's appeal brief to the New York State Court of Appeals is annexed as "Exhibit C".

WHEREFORE, your deponent submits that the aforesaid exclusion of the defendant during his trial was in violation of the defendant's rights guaranteed by the Constitution of the United States, and he moves on behalf of defendant that, in accordance with Section 440.10, subdivision 1 (h), of the Criminal Procedure Law, the judgment of the Nassau County Court, based on this exclusion be vacated.

MATTHEW MURASKIN

Sworn to before me this
25th day of September, 1974

Louise G. [illegible]
Notary Public, State of New York
[illegible]
Qualified in Nassau County
Cert. filed in Nassau County
Commission Expires March 30, 19[illegible]